85-1449

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1985

TOWN OF NEWTON, ETC., ET AL.,
PETITIONERS,

v.

BERNARD E. RUMERY, JR.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Questions Presented For Review

1. Are covenants not to sue police officers or public officials for alleged deprivation of civil or constitutional rights, offered in return for a prosecutor's agreement to drop pending criminal charges, valid and enforceable if given voluntarily and deliberately by an informed criminal defendant?

2. Does the mere possibility of prosecutorial abuse require a *per se* prohibition of all release-dismissal agreements on federal public policy grounds, regardless of the facts or circumstances of the case?

List of All Parties

TOWN OF NEWTON (NEW HAMPSHIRE),
a municipal corporation;

DAVID T. BARRETT,
individually and as Chief of Police
for the Town of Newton;

KENNETH L. BOWERS, WILLIAM J. COOK
and MARY ALLEN, individually and in their official
capacities as Selectmen for the Town of Newton;
PETITIONERS,

v.

BERNARD E. RUMERY, JR.,
RESPONDENT.

TABLE OF CONTENTS

	Page
Questions Presented for Review	I
List of All Parties	II
Table of Authorities	IV
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions	2
Statement of the Case	2
Background	2
Jurisdiction Below	4
Argument	5
I. This Court Should Grant Certiorari Because the Court of Appeals for the First Circuit Has Adopted a *Per Se* Rule of Federal Public Policy Prohibiting All Release-Dismissal Agreements, Further Polarizing an Existing Conflict in the Circuits	5
II. This Court Should Grant Certiorari Because the *Per Se* Rule Adopted by the Court of Appeals for the First Circuit Too Narrowly Defines the Public Interest and Places an Unwarranted Constraint on Prosecutors, Raising an Important Question of Federal Law	11
Conclusion	16

Appendix

A—Opinion of the United States Court of Appeals	A-1
B—Opinion of the United States District Court	B-1
C—Judgment Sought to be Reviewed	C-1
D—Constitutional and Statutory Provisions	D-1, D-2
E—Covenant Not to Sue	E-1

Table of Authorities

Page

Cases

Bordenkircher v. *Hayes*, 434 U.S. 357 (1978) 12
Boyd v. *Adams*, 513 F.2d 83 (7th Cir. 1975) 8,10
Brady v. *United States*, 397 U.S. 742 (1970) 12
Bushnell v. *Rossetti*, 750 F.2d 298 (4th Cir. 1984) ... 5, 6, 7, 8, 10, 11
Corbitt v. *New Jersey*, 439 U.S. 212 (1978) 12
Dixon v. *District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968) 8, 9, 10
Food Fair Stores, Inc. v. *Joy*, 283 Md. 205, 389 A.2d 874 (Md. App. 1978) 14
Hoines v. *Barney's Club, Inc.*, 28 Cal.3d 603, 170 Cal. Rptr. 42, 620 P.2d 628 (1980) 6, 7, 11, 12, 13, 14
Horne v. *Pane*, 514 F. Supp. 551 (S.D. N.Y. 1981) 10
Jones v. *Taber*, 648 F.2d 1201 (9th Cir. 1981) 5, 6, 7, 8
MacDonald v. *Musick*, 425 F.2d 373 (9th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970) 8, 9, 10, 11
Premier Electric International Corp. v. *Solar Devices, Inc.*, 778 F.2d 71 (1st Cir. 1985) 11
Rumery v. *Town of Newton, etc., et al.*, 778 F.2d 66 (1st Cir. 1985), *rev'g* No. C 84-279-L (D. N.H. 1985) 1

United States Constitution:

First Amendment 2, 8, 9
Fourteenth Amendment 2, 4, 9, 12

Federal Statutes:

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 4
28 U.S.C. § 1343(3) 4
42 U.S.C. § 1981, *et seq.* 6
42 U.S.C. § 1983 ..... 2, 4, 5

State Statute:

New Hampshire RSA 641:5 2
641:5,I(b) 2

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Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reported at 778 F.2d 66 and appears in Appendix A. The opinion of the United States District Court for the District of New Hampshire, not officially reported, appears in Appendix B.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was entered on December 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

Relevant constitutional and statutory provisions are set forth in Appendix D: the First and Fourteenth Amendments to the Constitution of the United States; 42 U.S.C. § 1983; and New Hampshire RSA 641:5.

Statement of the Case

Background

At issue is the validity of a criminal defendant's pre-conviction waiver of the right created by 42 U.S.C. § 1983 to sue public officials for alleged deprivation of federal civil and constitutional rights.

The criminal defendant, civil plaintiff and respondent in this case, Bernard E. Rumery, Jr., was arrested on May 12, 1983, for tampering with a witness, in violation of New Hampshire RSA 641:5, I(b), a Class B felony (D-2). Respondent, a married, middle-aged insurance company marketing representative, had no prior arrest or criminal record. His arrest for witness tampering resulted from telephone conversations he had with the victim in a pending case of alleged aggravated felonious sexual assault. Respondent and the alleged rapist were hunting companions. Both knew the victim. Respondent's arrest came after statements by the victim to the police to the effect that respondent gave her an ultimatum: either drop the rape charges or suffer physical and emotional harm.[1] (A-2, 3, B-1, 3)

[1] Respondent insisted he did not threaten the victim. At the hearing before the United States District Court, petitioners introduced the police report containing the victim's statement that respondent told her she [and her daughter] "might end up like two [recently murdered] women in . . . Massachusetts" if she persisted with the rape case. (B-1, 2) Because the District Court enforced the covenant not to sue, it did not determine whether respondent actually threatened the victim. The District Court did find respondent informed the victim "if she did not want to hurt Champy [her alleged attacker] she could call the county attorney and ask him to drop the charges. According to [respondent] the conversation was innocuous. . . ." (B-3)

Respondent was arrested at his home pursuant to a warrant issued by a municipal district court. He was advised of his rights, handcuffed and transported to jail for booking. Following his release on personal recognizance, respondent retained an experienced criminal attorney, who contacted the deputy county attorney assigned to prosecute both the rape and witness tampering cases. (A-3, B-3) They discussed "whether the State would be willing to drop the prosecution of . . . the witness tampering charge in exchange for the [respondent's] signing a release indicating he would not sue the parties involved. . . ."[2] (B-2)

The covenant not to sue (Appendix E) was drafted by respondent's defense attorney, who presented the document at his office to his client, on or about June 3, 1983, less than a month following the arrest. A probable cause hearing had been scheduled for June 14, 1983. The case has not been presented for grand jury indictment. Respondent's defense attorney discussed the covenant with him for an hour or so, advising him that, if he executed the covenant, he would be waiving all claims arising from his arrest for witness tampering. The covenant not to sue named the victim (complainant) in addition to the Town and its police department. (See Appendix E.)

After considering the matter for three days, respondent executed the covenant not to sue, on June 6, 1983. The District Court found the prosecutor had exerted no pressure on respondent to sign the covenant. (B-2) Subsequently, as agreed, the

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[2] The prosecutor testified he had been advised that the victim did not want to testify against respondent. He was particularly concerned because she was the principal witness in the ongoing rape case. The alleged rapist had already been indicted. The prosecutor testified he considered the possible trauma to the victim if she were forced to testify. When the covenant not to sue was being discussed, the prosecutor "didn't know if they would have forced [the victim] to testify" against respondent on the witness tampering charge. Neither he nor respondent's defense attorney could recall specifically who first suggested the possibility of a covenant not to sue, in return for which the charges against respondent would be dropped. (B-2)

prosecutor entered a *nolle prosequi* on the witness tampering charge. The scheduled probable cause hearing was not held.

Jurisdiction Below

Ten months later, in April 1984, reneging on his agreement, respondent filed a six-count civil rights action, raising claims under 42 U.S.C. § 1983, as well as pendent state law claims. Petitioners pleaded the covenant not to sue as an affirmative defense.[3]

The District Court looked at the circumstances, found no indication of prosecutorial coercion or vindictiveness and dismissed the complaint, specifically finding:

> [Respondent] is a knowledgeable, industrious individual with vast experience in the business world. Further, he intelligently and carefully, after weighing all the factors, concluded, that it would be in his best interest and welfare to sign the covenant. He was also represented by a very competent attorney. . . . (B-4) (See also A-3, 4, where the Court of Appeals noted this finding.)

On appeal, the Court of Appeals (Circuit Judges Coffin, Breyer and Timbers[4]) summarized the facts found by the trial court and found no reason to question these findings. Nonetheless, the Court of Appeals categorically held as a matter of federal law:

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[3] The District Court's jurisdiction was invoked under 28 U.S.C. §§ 1331 and 1343(3). The original complaint alleged deprivation of rights secured by the Fourteenth Amendment, arising from respondent's arrest, and negligence, defamation, false imprisonment, negligent infliction of emotional distress and state constitutional violations. After petitioners raised the covenant as a bar, respondent moved to amend the original complaint to add a count alleging deprivation of rights secured by the Fourteenth Amendment by alleged "extraction" of the covenant not to sue.

[4] Of the Second Circuit, by designation.

> [A] covenant not to sue public officials for alleged deprivations of constitutional rights, executed in exchange for a decision not to prosecute criminal charges, is void *ab initio* as against public policy. (A-2)

The Court of Appeals held "such releases have the effect of injuring the public interest." (A-6) The Court in effect held that a criminal defendant cannot, as a matter of law, make an uncoerced choice "between filing a civil rights claim and being prosecuted on a criminal charge." (A-7)

Argument

I. This Court Should Grant Certiorari Because the Court of Appeals for the First Circuit Has Adopted a *Per Se* Rule of Federal Public Policy Prohibiting all Release-Dismissal Agreements, Further Polarizing an Existing Conflict in the Circuits.

In its decision, the Court of Appeals recognized "that [its] sister federal courts of appeals have reached varying results" in deciding whether agreements by criminal defendants releasing civil rights claims are enforceable. (A-4)

In the most recent of these cases, *Bushnell* v. *Rossetti*, 750 F.2d 298 (4th Cir. 1984), the Court of Appeals for the Fourth Circuit analyzed the circumstances surrounding the release and enforced it. The *Bushnell* Court used the standard announced in *Jones* v. *Taber*, 648 F.2d 1201 (9th Cir. 1981), which held that a release of claims under 42 U.S.C. § 1983 may be valid if it results from a decision which is "voluntary, deliberate, and informed." *Id.* at 1203.[5] The District Court

[5] The plaintiff in *Jones* was being held in jail after conviction, while awaiting sentencing. Allegedly, he was taken from his cell, abused and beaten and then placed in a special segregation cell for 19 days. Subsequently, he was escorted to an interview room and offered $500 to release all claims arising from his mistreatment. The Court held the release could be enforced if it were voluntary, deliberate and informed. Remanding for trial on this issue, the Court noted objective factors which might dissipate a coercive

here applied the standard adopted in *Jones* and *Bushnell*, but the Court of Appeals rejected it in favor of a *per se* rule of federal public policy which flatly prohibits prosecutors from offering or accepting release-dismissal agreements, under any circumstances. (A-8, 9)

In contrast, the Court in *Bushnell* rejected the plaintiff's "broad contention that any release of civil rights claims in exchange for criminal sentencing considerations is *per se* void and unenforceable." *Bushnell*, *supra*, 750 F.2d at 301. The Court there found no evidence of prosecutorial abuse on the facts.[6] In enforcing the agreement, the Court found that Bushnell, as an attorney himself, was fully aware of the legal consequences of the release agreement, and he consulted privately with his own criminal defense attorney before executing it. Under those circumstances, the Court said, the release was voluntary, deliberate and informed, and hence, enforceable.

The *Bushnell* Court said it would "leave to a future date consideration of the validity of release agreements in exchange for dismissal of criminal charges, negotiated in facially non-coercive circumstances." *Id.* at 301 n.*. The Court of Appeals for the First Circuit has now had that opportunity, and its decision, adopting a *per se* rule, conflicts with the case-by-case approach followed in *Bushnell*.[7]

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atmosphere, "such as the presence of an attorney representing the releasing party or the opportunity for [him] to consider the consequences of his actions in a neutral environment." *Jones*, *supra*, 648 F.2d at 1205.

[6] The plaintiff, while trying to report a crime he had just witnessed, became agitated and was himself arrested for disorderly conduct and resisting arrest. He then filed a federal civil rights claim under 42 U.S.C. § 1981, *et seq*. Subsequently, he was tried and convicted on the criminal charges. Counsel for the defendants in the federal civil rights action approached him, proposing an agreement whereby he would agree to dismissal of the civil rights suit with prejudice if in exchange the prosecutor could be persuaded to recommend probation before judgment. The prosecutor made the recommendation, which was granted by the court, and the plaintiff, an attorney, was thus spared a criminal record. However, in the months following, he refused to sign a proposed dismissal order in the civil action, as agreed.

[7] The Court of Appeals for the Fourth Circuit cited *Hoines* v. *Barney's Club, Inc.*, 28 Cal.3d 603, 170 Cal. Rptr. 42, 620 P.2d 628 (1980), in which

In the opinion below, the Court of Appeals here indicated that public policy considerations which the *Bushnell* Court found inapplicable in the post-conviction setting "may be invoked appropriately in the instant case" involving dismissal of criminal charges. (A-5, 6) Petitioners submit that the distinction drawn by the Court below does not, however, reconcile the conflict between its approach and that adopted in *Bushnell* and *Jones*, *supra*.

In *Bushnell*, the Court observed that the plaintiff's conviction had "removed the possibility that the charges. . . were fabricated in order to coerce him into releasing his civil claim against the city and its agents." *Bushnell*, *supra*, 750 F.2d at 302. But, in this case, the *per se* rule adopted by the Court below precludes any opportunity to show from other evidence, in the pre-conviction context, that the criminal charges were not fabricated with coercive intent.

The *Bushnell* Court further observed that the danger of "forestalling exposure of possibly unconstitutional or illegal government practices" was not present in the post-conviction setting. *Id.* at 301. But the approach taken by the Court of Appeals below, because it precludes looking at the circumstances of the pre-conviction case, is tantamount to a conclusive presumption of official misconduct. The Court's approach necessarily places the abstract public interest in exposing the few instances of official misconduct above the individual's specific right in every case to evaluate alternatives and make a voluntary, deliberate, informed and self-interested decision. The effect of the Court's holding is to prohibit the criminal defendant from seeking an agreement and the prosecutor from ever accepting it.

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the Supreme Court of California, adopting a flexible approach, concluded that "the time honored practice of discharging misdemeanants on condition of release of civil liabilities or stipulation of probable cause for arrest, does not contravene public policy *when the prosecutor acts in the interests of justice.*" 28 Cal.3d at 613-14, 170 Cal. Rptr. at 49, 620 P.2d at 635 (emphasis added).

The approach taken by the Court below cannot be harmonized with the spirit of the *Bushnell* case, which recognized the considerable benefit to the plaintiff from the agreed exchange. Nor can the approach below be reconciled with the specific holding of the Court of Appeals for the Ninth Circuit in the *Jones* case, *supra*, in which even the manifest mistreatment of the plaintiff did not cause the Court to foreclose the possibility of a voluntary, deliberate and informed act or to hold the release void *ab initio* as against federal public policy.

The potential for prosecutorial abuse envisioned in the opinion below was actually presented on the facts in the key cases with which the Court of Appeals here aligned itself: *Dixon* v. *District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968), and *MacDonald* v. *Musick*, 425 F.2d 373 (9th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970). Chief Judge Bazelon, writing for the Court in *Dixon*, and Judge Duniway, in *MacDonald*, condemned release-dismissal agreements on both federal public policy and constitutional grounds. Their strictures on prosecutorial discretion were subsequently applied by the Court of Appeals for the Seventh Circuit in *Boyd* v. *Adams*, 513 F.2d 83 (7th Cir. 1975) (a case involving alleged police brutality).

In *Dixon*, the Court of Appeals deplored the prosecutor's action, stating:

> The Government may not prosecute for the purpose of deterring people from exercising their right to protest official misconduct and petition for redress of grievances. *Dixon*, *supra*, 394 F.2d at 968.[8]

The *Dixon* Court saw potential equal protection, as well as First Amendment, violations inherent in a situation in which

[8] *Dixon* involved a black motorist, who was stopped by two white police officers for alleged traffic violations. He was neither charged nor ticketed at the time. After making a written complaint about the officers' conduct, he entered into a tacit agreement: he would not proceed with his complaint and the government would not prosecute the traffic charges. Later, he made a formal complaint, and the prosecutor responded by filing charges.

those who complain about police misconduct are punished and those who do not are excused. To remove the danger of trumped-up charges, the Court held it was necessary to "bar prosecutions which are brought because the defendant refused to promise or reneged on a promise not to file a complaint against the police." *Id.* at 969.

In *MacDonald, supra*, the Court of Appeals for the Ninth Circuit concluded that a lesser charge on which conviction was likely had been added as "the bludgeon" behind an attempt "to hamper MacDonald in asserting, by civil action, both state and federal civil rights."[9] The Court deemed this practice offensive to the First and Fourteenth Amendments. *MacDonald, supra*, 425 F.2d at 377.

In the instant case, there is not even a hint of misconduct by the prosecutor. Nothing in the record below indicates he was attempting to cover up police misconduct. There were no concocted charges added by the prosecutor, and the District Court found he exerted no pressure to have respondent sign the covenant. In addition, the prosecutor testified he believed there was probable cause for the arrest, assuming the victim was telling the truth. However, in the absence of corroborating evidence, respondent's conviction depended upon the victim's credibility as a witness, and she had expressed her reluctance to testify. Moreover, she was also the key witness in the pending rape case, in which an indictment had been returned, and the prosecutor was concerned about her emotional vulnerability. (B-1, 2) The Court of Appeals below took none of these circumstances into account, nor did it consider the benefit respondent derived from the agreement.

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[9] A motorist was arrested for driving under the influence. On the day of trial, the prosecutor moved to dismiss the charge. When the accused refused to stipulate to probable cause, however, the prosecutor withdrew the motion and amended the charge to include resisting arrest, a charge on which there was a greater chance of conviction, and on which the accused was, in fact, convicted.

Instead, the Court's overriding concern for *potential* prosecutorial abuse led it to adopt a *per se* rule which appears to brook no exceptions. The Courts in *Dixon*, *MacDonald* and *Boyd*, *supra*, were justifiably offended by what was perceived to be official misconduct under the circumstances in those cases.[10] Indeed, the Court of Appeals for the Fourth Circuit analyzed the circumstances in those cases and limited their holdings to a prohibition "against use of government's prosecutorial power either to exact releases of related civil rights claims or to retaliate for civil prosecution of such claims." *Bushnell*, *supra*, 750 F.2d at 301.

Taking the opposite approach, the Court of Appeals for the First Circuit here ignored the real factual differences between this case and *Dixon*, *MacDonald* and *Boyd*, *supra;* drew an artifical distinction between *Bushnell* and this case; and cited with approval the holding of *Horne* v. *Pane*, 514 F. Supp. 551, 552 (S.D. N.Y. 1981), "that a defendant forced to choose between filing a civil rights claim and being prosecuted on a criminal charge cannot make an uncoerced choice as a matter of law." (A-7)

The manifest conflict in the approaches taken in the various circuits prior to the instant case is so polarized that certiorari is warranted. The conflict is not just an apparent one which disappears upon closer examination, but rather, a fundamental difference in point of view: is a case-by-case analysis appropriate to determine the circumstances, including whether the criminal defendant has made a "voluntary, deliberate and informed" waiver, or are such release-dismissal agreements void *ab initio* on federal public policy or constitutional grounds?

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[10] In *Boyd*, the plaintiff's civil rights claim alleged that police officers stopped and searched the car in which she was riding. They also searched its three male occupants and found nothing incriminating. Plaintiff refused to be searched. The police officers then allegedly pushed her violently against the car, used abusive language, threatened her, arrested her, and took her to the police station where she was incarcerated for five hours and charged with disorderly conduct and resisting a police officer in the performance of his duties. Plaintiff allegedly was pregnant and later suffered a miscarriage as a result of the assault.

II. This Court Should Grant Certiorari Because the *Per Se* Rule Adopted by the Court of Appeals for the First Circuit too Narrowly Defines the Public Interest and Places an Unwarranted Constraint on Prosecutors, Raising an Important Question of Federal Law.

The Court of Appeals below observed "[s]ince the object of a criminal prosecution is to vindicate the public, not a private individual, an agreement not to prosecute should be upheld only where the *public* interest is served. "(A-6) (emphasis in original)"[11] In the First Circuit, release-dismissal agreements are viewed as inherently coercive and injurious to the public interest. This view is not uniformly held by federal judges, however, as *Bushnell* and the dissenting opinion in *MacDonald*, *supra*, demonstrate.

In his dissent in *MacDonald*, Judge Kilkenny termed the approach of the majority "wholly unrealistic" and expressed his "firm belief that those in charge of prosecution of criminal actions have a duty to protect, if probable cause exists, arresting officers from both state or federal civil actions." 425 F.2d at 377. He went on to conclude that the majority had "erroneously raised a simple procedural act of the prosecutor to the dignity of constitutional dimensions." *Id.* at 378.

This view was also expressed in *Hoines* v. *Barney's Club, Inc.*, *supra*, n.7. There the California Supreme Court examined release-dismissal agreements in light of policy considerations bearing on plea bargaining transactions and concluded:

> Because a release-dismissal transaction normally concerns itself with lesser acts of criminal conduct, the state may

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[11] In a private release agreement case decided the same day, the Court referred to the instant case in these terms: "Although consideration existed to support the contract in *Rumery*, we still found the contract invalid . . . because it did not serve the public interest. . . . Because the criminal laws seek to vindicate the public interest, agreements must . . . serve the interests of the public, not just those of the prosecutor." *Premier Electric International Corp.* v. *Solar Devices, Inc.*, 778 F.2d 71, 74-75 (1st Cir. 1985).

> reasonably elect to forego the imposition of any criminal proceedings or sanctions. However, in so doing it must protect those who—because the charges are to be dismissed—might be improperly exposed to claims of civil liabilities. . . . In requiring a release from the accused—*but only by his free and voluntary election*—the state accomplishes both the imposition of the bargained-for disability and protection of those it reasonably deems to be innocently involved. 28 Cal.3d at 612-13, 170 Cal.Rptr. at 48, 620 P.2d at 634 (emphasis added).

Cf. Corbitt v. *New Jersey*, 439 U.S. 212, 218-19 & n.8 (1978) ("not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid"); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 365 (1978) (prosecutor's conduct, which merely presented defendant with alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate Due Process Clause of Fourteenth Amendment); and *Brady* v. *United States*, 397 U.S. 742, 748 (1970) (guilty plea acceptable if voluntary, knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences).

The California Supreme Court in *Hoines*, *supra*, took a more expansive view of the public interest than did the Court of Appeals in this case. The majority view in *Hoines* is well explained by this excerpt from the opinion of a lower court justice:

> "Municipal court judges for many years have been accustomed to dismissing minor misdemeanor cases on motion of the district attorney upon assurance that law enforcement officers, public agencies or private parties will not be subjected to civil litigation by the criminal defendant. This occurs not infrequently in shoplifting cases, disturbances involving husbands and wives, and a myriad of other disturbance situations. Often, the arrest and tem-

> porary detention of a person . . . is sufficient to defuse an otherwise volatile situation, to the end that further criminal prosecution is unnecessary and undesirable. Further prosecution in many cases would cause embarrassment in employment, unnecessary matrimonial hostility or . . . a possible thwarting of a future career. The reasons are multitudinous for the district attorney not to want to pursue the prosecution of a person arrested with probable cause for a minor public offense, in the best interest not only of society but of the individual involved. At the same time, it is reasonable to seek to protect the arresting officer or the complaining individual from the burden of civil litigation arising out of the incident. [¶] If this tool is taken away from the district attorney, . . . there will be a likelihood that many cases which otherwise would have been dismissed will be prosecuted, to the detriment of society as well as the victim and the defendant." 28 Cal.3d at 610 n.7, 170 Cal. Rptr. at 47 n.7, 620 P.2d at 633, n.7.

This explication of how release-dismissal agreements may serve, not injure, the public interest could have been written with the facts of the instant case in mind. Witness tampering, the offense with which respondent was charged, is a "disturbance situation," which arrest can stop. Respondent in this case was not likely to speak to the victim again about the pending rape case, and further prosecution would have caused him personal and professional embarrassment.

In addition, not only would further prosecution have resulted in a possible criminal conviction for respondent as well as expense to the state, but it would have subjected an overwrought victim to the ordeal of testimony in both the witness tampering and rape cases. In such a situation, it was a reasonable prosecutorial decision to forgo forcing the reluctant victim to testify in the witness tampering case, in order to conserve her testimony in the rape case. This decision, in fact, served the very object of the witness tampering statute, which is to protect witnesses.

Under the circumstances it was reasonable and consistent with the public interest for the prosecutor to accept the covenant not to sue. Respondent's criminal defense attorney had threatened civil litigation and was demanding immediate dismissal of charges, prior to a probable cause hearing or grand jury indictment hearing. At the same time, respondent's attorney was also pursuing the possibility of a covenant not to sue. In such a situation, so long as respondent willingly and knowingly executed the covenant, it was in the public interest to spare the victim (complainant) and local police and municipal officials the burden of potential civil litigation.[12]

Indeed, the California Supreme Court went even further in the *Hoines* case, *supra*, by holding that the prosecutor may in appropriate circumstances condition dismissal on a release of civil liabilities or stipulation of probable cause for arrest. The Court there said, "Surely we cannot embrace a proper plea bargaining transaction while rejecting a proper release-dismissal transaction as against public policy." *Hoines*, *supra*, 28 Cal.3d at 613, 170 Cal. Rptr. at 49, 620 P. 2d at 635.

In the instant case, the Court of Appeals conceded:

> A release of a civil rights claim might arguably be given effect where the prosecution acts reasonably and has a fairly good case against the claimant. But in such a case, a good defense . . . will exist and the need for a release will not come into play. . . . We hold that an exception cannot easily be shown important enough to outweigh its administrative burdens. (A-8)

Petitioners disagree. The Court's conclusion, a release is not "needed" where there is a good defense, erroneously assumes that claims without merit will not be brought, or, if brought, can easily and inexpensively be defended. This view discounts

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[12] *Cf. Food Fair Stores, Inc.* v. *Joy*, 283 Md. 205, 389 A.2d 874, 882 (Md. App. 1978) (mere offer of prosecutor to enter a *nolle prosequi* conditioned upon release of the complainant from civil liability was proper).

the considerable expense of defending civil rights claims against public officials, including settlement of claims without merit at "cost of defense", and the growing cost and difficulty municipalities face in obtaining liability insurance coverage for these claims. This view does not take into account the increasing burden of civil rights claims on state and federal court dockets, nor the potential effect on criminal court dockets from the ruling that release-dismissal agreements are void *ab initio*. These, too, are matters of public concern, whose pressures could be alleviated by allowing prosecutors to exercise reasonable discretion and by permitting courts to enforce voluntary, deliberate and informed release-dismissal agreements. To do so would not close the door to civil relief on the criminal defendant who has suffered abuse by public officials. Releases extracted under circumstances abridging civil or constitutional rights would not withstand scrutiny. But, a *per se* rule of law is potentially harmful in this context and constitutes an unwarranted constraint on the criminal justice system.

This Court has previously examined constitutional and public policy arguments similar to those raised by this case in the plea bargaining context. Petitioners submit that the opinion of the Court of Appeals below, holding covenants not to sue executed in return for dismissal agreements to be void *ab initio*, presents issues with equally far-reaching and significant implications. The facts surrounding the instant case, which the Court of Appeals disregarded in its desire to eliminate even the possibility of prosecutorial abuse, present an excellent occasion for this Court to provide much needed guidance on this important question of federal law.

Conclusion

This is the appropriate time to resolve the conflicting positions taken by the Courts of Appeals. If the release is enforceable under the circumstances of this case, its intended effect will not be achieved if certiorari is denied. For all the foregoing reasons, petitioners say that the petition should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 85-1508

BERNARD E. RUMERY, JR.,

PLAINTIFF, APPELLANT,

v.

TOWN OF NEWTON, ETC., ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[HON. MARTIN F. LOUGHLIN, *U.S. District Judge*]

Before

COFFIN, BREYER and TIMBERS, *
Circuit Judges.

Charles P. Bauer with whom *G. Wells Anderson* and *Hall, Morse, Gallagher & Anderson* were on brief for appellant.

James S. Yakovakis with whom *Brian T. McDonough, James S. Yakovakis Professional Association, Donald E. Gardner* and *Devine, Millimet, Stahl & Branch Professional Association* were on brief for appellees.

December 2, 1985

* Of the Second Circuit, by designation.

TIMBERS, *Circuit Judge:*

Bernard E. Rumery, Jr. ("appellant") appeals from a judgment entered April 30, 1985 in the District of New Hampshire, Martin F. Loughlin, *District Judge*, granting defendants' motion to dismiss appellant's § 1983 claim and various pendent state law claims. The district court dismissed the complaint based on appellant's prior execution of a covenant not to sue, negotiated in exchange for the state prosecutor's decision to *nolle prosequi* a criminal case against appellant on a witness tampering charge. On appeal, Rumery contends that the district court erred in holding that the release barred his complaint and asserts that the covenant should be held void as against public policy. We hold that a covenant not to sue public officials for alleged deprivations of constitutional rights, executed in exchange for a decision not to prosecute criminal charges, is void *ab initio* as against public policy. We reverse.

I.

We shall summarize only those facts believed necessary to an understanding of the issues raised on appeal.

Rumery, a resident of Danville, New Hampshire, is a middle-aged marketing representative for an insurance company. After reading in a local newspaper that a former hunting companion of Rumery, one David Champy, had been charged with aggravated felonious sexual assault, Rumery telephoned Mary Deary to inquire whether she knew anything about the incident. Rumery and Mary Deary were business and social acquaintances. Rumery learned that Mary Deary was the alleged victim and the state's principal witness in the criminal case against Champy.

On May 11, 1983 Rumery and Mary Deary had a second telephone conversation. Appellees (the Town of Newton, its Chief of Police, David T. Barrett, and its Selectmen) contend that Rumery informed Mary Deary that Champy's wife had left him and that, if Mary did not want to hurt Champy, she

could call the county attorney and ask him to drop the charges. Rumery asserts that the conversation was innocuous and that he made no threats to Mary Deary. Chief Barrett indicated to Deputy County Attorney Brian Graf that Rumery had made statements to Mary Deary to the effect that she might end up like two women in Lowell, Massachusetts, who had been murdered. On May 12, Chief Barrett arrested Rumery for tampering with a witness, in violation of New Hampshire Rev. Stat. Ann. § 641:5,I,(b), a Class B felony. Rumery was arrested at his home in the presence of his wife, was handcuffed, and was taken to the Rockingham County jail.

Following his release on his personal recognizance, Rumery retained Stephen Woods as counsel. Woods, an experienced criminal attorney, and Graf discussed the possibility that the prosecution of Rumery could be dropped if Rumery signed a covenant not to sue the persons connected with his arrest. Chief Barrett had advised Graf that Mary Deary did not wish to testify against Rumery. Graf expressed concern about the lack of corroborating evidence of the telephone conversations.

Woods drafted the covenant not to sue and discussed the matter with Rumery. Three days after consulting with Woods, and before a hearing on probable cause for the arrest, Rumery signed the covenant not to sue the public officials connected with his arrest. Thereafter, the witness tampering charge against Rumery was dropped.

In April 1984, Rumery filed in the district court a six-count complaint pursuant to 42 U.S.C. § 1983 (1982) alleging both federal and pendent state law claims arising from his arrest for witness tampering. [1] Defendants Town of Newton, Chief Barrett and the Selectmen pleaded the covenant not to sue as an affirmative defense. In response to defendants' motion to dismiss and/or petition for declaratory judgment, the district court dismissed the complaint, finding, *inter alia*, that Rumery

[1] Appellant's state law claims alleged negligence, defamation, false imprisonment, negligent infliction of emotional distress, and state constitutional violations.

is a knowledgeable, industrious individual with extensive experience in the business world, that he carefully considered whether to sign the covenant not to sue, and that he was represented by competent and experienced counsel. This appeal followed.

II.

Whether a covenant not to sue public officials, executed in exchange for a decision to *nolle prosequi*, is void *ab initio* is an issue of first impression under § 1983 in this Circuit. Federal law determines the validity of this release of federal constitutional rights. *Jones* v. *Taber*, 648 F.2d 1201, 1203 (9th Cir. 1981); *Boyd* v. *Adams*, 513 F.2d 83, 87 (7th Cir. 1975). There is no need, therefore, for us to examine New Hampshire law on the issue.

We recognize that our sister federal courts of appeals have reached varying results in determining the validity of releases of the right to sue for alleged violations of constitutional rights negotiated in the criminal law context. Appellees urge us to embrace the approach adopted by the Ninth and Fourth Circuits in cases which involved an analysis of whether the releases were executed in a voluntary, informed and deliberate manner.

In *Jones*, *supra*, the Ninth Circuit focused on objective factors in determining the validity of a release negotiated in exchange for $500. Following his conviction but awaiting sentencing, Jones alleged that he was taken from his cell, stripped, gagged, chained to a wall, hosed with cold water, beaten with a nightstick, and placed in a segregation cell for nineteen days. In holding that there was a triable issue of fact as to the voluntariness of the release of public officials' liability precluding summary judgment, the court considered such factors as the coercive environment, the absence of an attorney, and the pending sentencing. In this post-conviction context, the Ninth Circuit directed courts to examine whether the release was "voluntary, deliberate and informed." *Jones*, *supra*, 648 F.2d at 1203.

Appellees also rely on the Fourth Circuit's decision in *Bushnell* v. *Rossetti*, 750 F.2d 298 (4th Cir. 1984), where the court rejected the argument that *all* agreements releasing civil rights in exchange for criminal sentencing consideration should be void as against public policy. The court instead applied the "voluntary, deliberate, and informed" standard. *Bushnell*, *supra*, 750 F.2d at 302 (citing *Jones*). Bushnell had been arrested and convicted for disorderly conduct and resisting arrest. In exchange for Bushnell's promise to dismiss with prejudice his civil rights claim against public officials, counsel for defendants police, mayor, and city council suggested to the prosecutor that he recommend probation at the sentencing hearing. The Fourth Circuit specifically limited its decision to release agreements negotiated after a determination of guilt but before sentencing, reserving for a later day the issue of the validity of a release exchanged for dismissal of criminal charges negotiated in a noncoercive environment. *Bushnell*, *supra*, 750 F.2d at 301 n.*. The potential for prosecutorial abuse, exacting releases of related civil rights claims or retaliating for civil prosecution of such cases by threatening a claimant with charges, did not exist in the post-conviction setting according to the *Bushnell* court. *Id.* at 301. Moreover, the court stressed that "the potential for forestalling exposure of possibly unconstitutional or illegal government practices" is not present because the police practices that were the subject of the § 1983 claim were already "exposed to full public inquiry when the dismissal agreement was executed." *Id.*

We decline appellees' invitation to apply the *Bushnell* and *Jones* holdings to the pre-conviction situation involved in the instant case. Rumery executed his covenant not to sue while a criminal charge of witness tampering was still pending. The deputy county attorney was in a position to use the threat of prosecution as a sword while simultaneously shielding public officials from a civil rights claim. The public policy considerations which the *Bushnell* court found inapplicable in the post-

conviction setting indeed may be invoked appropriately in the instant case.

III.

The need closely to scrutinize contracts or agreements in the criminal law context is particularly important because of the special relationship between a criminal prosecution and the public interest. Courts ordinarily are reluctant to set aside a contract provision in an ordinary agreement because, no matter how badly off one of the parties may be, the agreement is likely to benefit both parties in some way. But an agreement in the criminal context is different. Since the object of a criminal prosecution is to vindicate the public, not a private individual, an agreement not to prosecute should be upheld only where the *public* interest is served.[2] It is difficult to envision how release agreements, negotiated in exchange for a decision not to prosecute, serve the public interest. Enforcement of such covenants would tempt prosecutors to trump up charges in reaction to a defendant's civil rights claim, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights. We agree with those courts which have found that such releases have the effect of injuring the public interest.

In *Boyd* v. *Adams*, 513 F.2d 83 (7th Cir. 1975), Judge Cummings specifically addressed the validity of a release executed after arrest but before conviction. Ms. Boyd's § 1983 claim against police officers and city officials alleged that the officers stopped and searched automobile passengers, found nothing incriminating, pushed the claimant against the car, used

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[2] We note the distinction between covenants not to sue for deprivations of constitutional rights in the context of a criminal prosecution and our decision today in *Premier Electric International Corp.* v. *Solar Devices, Inc.*, 778 F.2d 71 (1st Cir. 1985), which upholds a covenant not to sue exchanged for the adverse party's voluntary relinquishment of materials sought during the discovery stage of a civil case. The policy considerations which we find controlling here do not apply in *Premier Electric*.

abusive language, and incarcerated the claimant for five hours. Boyd claimed that she suffered a miscarriage as a result.

In addition to finding an inherently coercive environment at the time Boyd executed the covenant not to sue by virtue of the defendant's release on conditional recognizance bail and the inability to pay fines, the Seventh Circuit held that the release was void as against public policy. *Boyd*, *supra*, 513 F.2d at 88. [3] Similarly, in *Horne* v. *Pane*, 514 F. Supp. 551, 552 (S.D. N.Y. 1981), the court recognized that a defendant forced to choose between filing a civil rights claim and being prosecuted on a criminal charge cannot make an uncoerced choice as a matter of law.

The policy considerations underlying our decision were well stated in *Dixon* v. *District of Columbia*, 394 F.2d 966, 968-69 (D.C. Cir. 1968), a case where the prosecutor filed traffic charges when the defendant reneged on his agreement not to sue.

> "The Government may not prosecute for the purpose of deterring people from exercising their right to protest official misconduct and petition for redress of grievances.
>
> * * *
>
> The major evil of these agreements is not that charges are sometimes dropped against people who probably should be prosecuted. Much more important, these agreements suppress complaints against police misconduct which should be thoroughly aired in a free society. And they tempt the prosecutor to trump up charges for use in bargaining for suppression of the complaint."

And in a case where the claimant was arrested for driving under the influence and the prosecutor moved to drop charges if the defendant would stipulate to probable cause, foreclosing a claim against the police, the Ninth Circuit forcefully stated:

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[3] As in *Boyd*, we reject the argument that, because Rumery's lawyer may have been instrumental in negotiating the release, the release should be upheld. *See Boyd*, *supra*, 513 F.2d at 88.

> "It is no part of the proper duty of a prosecutor to use a criminal prosecution to forestall a civil proceeding by the defendant against the policemen, even where the civil case arises from the events that are also the basis for the criminal charge. We do not mean that the prosecutor cannot present such a criminal charge. What he cannot do is condition a voluntary dismissal of a charge upon a stipulation by the defendant that is designed to forestall the latter's civil case."

MacDonald v. *Musick*, 425 F.2d 373, 375 (9th Cir. 1970). *See also Horne* v. *Pane, supra.*

In addition to the policy considerations referred to above, we recognize that an exception to the general rule of invalidating such releases would pose administrative problems. Any exception is likely to promote police or prosecutors' efforts to obtain such releases. This would require an extensive investigation into whether the release indeed was made free of coercion. Moreover, the need for an exception to the invalidity of such releases is small. Where the prosecution is overreaching, acts unreasonably, or has a weak criminal case, the exception is not appropriate. A release of a civil rights claim might arguably be given effect where the prosecution acts reasonably and has a fairly good case against the claimant. But in such a case, a good defense to a civil rights claim will exist and the need for a release will not come into play. Thus, the exception to the general rule of invalidity has the anomalous character of not applying where the police may desire it, and applying where they do not need it. We hold that an exception cannot easily be shown important enough to outweigh its administrative burdens.

Here, the execution of the covenant not to sue in exchange for a decision not to prosecute Rumery on a witness tampering charge blocked Rumery's claim of police misconduct—conduct allegedly in violation of his constitutional rights. Although we recognize the latitude which prosecutors necessarily must have in determining whether to prosecute criminal charges, a

criminal defendant's decision to assert a civil rights claim is not a factor which the prosecutor should consider. In such a situation the prosecutor alone is holding the trump card to be played for the protection of those against whom a potential civil rights claim may be asserted. This finesse is too injurious to the public interest to be sanctioned. We decline to do so.

IV.

To summarize: We hold that a covenant not to sue public officials for alleged violations of constitutional rights, negotiated in exchange for a decision not to prosecute the claimant on criminal charges, is void as against public policy. We do not address on this appeal the merits of Rumery's federal civil rights claim. We hold only that appellees' reliance on the affirmative defense of the covenant not to sue cannot stand. We reverse and remand for proceedings consistent with this opinion.

Reversed.

APPENDIX B

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

C 84-279-L

BERNARD E. RUMERY, JR.

v.

TOWN OF NEWTON, ET AL.

ORDER ON MOTION TO DISMISS/AND OR PETITION FOR DECLARATORY JUDGMENT

The court makes the following findings of fact. The plaintiff instituted suit against the defendants as a result of his arrest on May 12, 1983 by defendant, David T. Barrett, Chief of Police of the Town of Newton.

Plaintiff was charged with the offense of tampering with a witness in connection with a case of aggravated felonious sexual assault. Criminal charges were later dropped against the plaintiff.

An evidentiary hearing was held on March 27, 1985. Three witnesses including the plaintiff testified. Additionally, Deputy County Attorney for Rockingham County, Brian R. Graf for the past four and a half years[,] was deposed on March 22, 1985 as he was in California on the date of the hearing. He became involved in the case of the *State of New Hampshire* v. *Champy*. The case involved an allegation that Champy had committed an aggravated felonious sexual assault on Mary Deary.

Champy had been indicted by the grand jury.

Chief Barrett indicated to Graf that Mary Deary had reported to the Newton Police that Mr. Rumery had made statements to the effect that if she were to go forward on the David Champy case she might end up like the two women in Lowell,

Massachusetts; he believed there was a reference in the report to an apparent murder of two women in Lowell, Massachusetts. Subsequently, Chief Barrett advised him that an arrest had been made. He had discussions with plaintiff's counsel in the criminal action, Stephen Woods, who is presently County Attorney for Rockingham County. A topic of discussion was that the State would be willing to drop the prosecution of the plaintiff for the witness tampering charge in exchange for the plaintiff signing a release indicating that he would not sue the parties involved in the particular case. He had further been advised by Chief Barrett that Mary Deary did not want to testify against the plaintiff. Also taken into consideration was the trauma if Mary Deary was forced to testify against the plaintiff.

Eventually an agreement was reached with Attorney Woods. All criminal charges were going to be disposed of and all civil actions he might have would also be done away with. This was accomplished. See exhibit A. He did not believe that he had anything to do with drafting the covenant not to sue. No pressure was exerted by him to have the plaintiff sign the covenant. He didn't know if they would have forced Mary Deary to testify.

Graf had no conversation with any of the other defendants to this action.

Stephen Woods who represented the plaintiff testified. On April 5, 1983 he was associated with Attorney Robert Shaw of Exeter, New Hampshire.

After the arrest of the plaintiff he spoke to Chief Barrett, but mainly dealt with Attorney Graf as Deputy County Attorney.

He stated the plaintiff was aware of the possibility of a civil action. Woods called Graf suggesting that the case be *nolle prosequi*. He could not recall who suggested the covenant not to sue.

Woods met in the office with the plaintiff and in his office discussed the covenant not to sue which he drafted. The conference lasted about an hour. He told the plaintiff that by sign-

ing the covenant he would forego all actions. Plaintiff wanted to give it further thought. His impression was that the plaintiff had the impression there was no civil claim if he signed.

Three days thereafter he called the plaintiff who stated that he decided to sign it. Plaintiff signed it in Wood's office and received a copy of the covenant.

Exhibit B is a letter dated May 19, 1983 from the Plaistow District Court to Attorney Woods scheduling a probable cause hearing.

He stated that without a covenant not to sue that the case would not have been *nolle prosequi*.

Exhibit 1 is a letter from Woods to the Plaistow District Court stating his understanding that all charges against the plaintiff had been *nol prossed* by the State.

The plaintiff is 55 years old and is a marketing representative of John Hancock Life Insurance Company. He is married and lives in Danville, New Hampshire. He has known Mary Deary for four or five years and he aided her after her husband's death. Champy was a friend that he had gone hunting with.

In a telephone conversation on May 11, 1983 with Mary Deary he informed her that Champy's wife had left him. Further he informed her that if she did not want to hurt Champy, she could call the county attorney and ask him to drop the charges. According to the plaintiff the conversation was innocuous and no threats made to Deary.

The next day at 10:30 P.M. he was arrested by Chief Barrett who was accompanied by another police officer. Miranda rights were read to him. Plaintiff called a neighbor who is a state trooper who advised him to cooperate and to get counsel. Subsequently, he was booked at Brentwood, then bailed.

Plaintiff then went to see Attorney Robert Shaw who had his associate, Woods, handle the case.

He was advised that if he signed the covenant it would be the end of the matter, but he was reluctant to do so.

Woods told him that if convicted, he would not be the first innocent person who had been jailed; further, that he would be indicted although he was innocent. He was afraid of going to jail. He stated that he read the covenant before he signed it, but only partially understood it.

Plaintiff's wife, Mary Rumery testified that they have been married for thirty-two years and have two children.

On one occasion she was on a telephone extension when Woods and the plaintiff were discussing the covenant. She told Woods, "I thought you were a fighter". She adamantly protested when the plaintiff signed the covenant.

In addition to the foregoing the court specifically finds that the plaintiff is a knowledgeable, industrious individual with vast experience in the business world. Further, he intelligently and carefully, after weighing all the factors, concluded, that it would be in his best interest and welfare to sign the covenant. He was also represented by a very competent attorney with more than ordinary expertise in the sometimes complex area of criminal law. The State and its subdivisions which includes all defendants by agreeing to the covenant through its authorized representative, Graf, gave up a potential defense to a possible lawsuit (which turned out to be an actual lawsuit).

The law on this issue as far as this court is concerned has never been determined by the First Circuit Court of Appeals and there is diversity in the case law.

Boyd v. *Adams*, 513 F.2d 83 (7th Cir. 1975). Facts: Plaintiff was in car and was stopped and forcefully searched. Abusive language was used and she was detained for five hours; a miscarriage resulted. Criminal charges were disorderly conduct, resulting in arrest. The charges were dismissed upon the plaintiff's agreeing to sign a release which she did. Plaintiff stated that she signed under duress, coercion and fear of further punitive and harassing action.

At page 87 is the following.

> . . . The question presented by plaintiff's contention is a purely federal one, whether a release executed under the circumstances presented here constitutes a valid waiver of plaintiff's constitutional rights. We need not consider whether the release would be valid in a suit based on Illinois tort law, because plaintiff has brought suit under a federal statute in federal court alleging deprivation of rights secured by the federal constitution.
>
> While the Supreme Court has recognized that one may voluntarily relinquish constitutional rights, it has also required that such relinquishments be entered into voluntarily under all of the circumstances presented. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222-234, 248, 93 S. Ct. 2041, 36 L.Ed.2d 854. The district court held the instant release valid because it found that plaintiff had knowingly waived her right to pursue civil claims against defendants and because no coercion or duress of any sort had been exerted upon her. We cannot agree. After her arrest, plaintiff was held in custody for five hours until her mother posted a bond. At the time plaintiff executed the release, she still was on conditional recognizance bail. Her uncontested testimony was that she would not be able to pay the disorderly conduct and resisting arrest fines.

It is immaterial that plaintiff's counsel commenced the discussion. The inherently coercive character of such a situation is not dependent upon which party first suggested the release since the very existence of the well-known release practice invited plaintiff's counsel to enter the negotiations.

> The Government may not prosecute for the purpose of deterring people from exercising their right to protest official misconduct and petition for redress of grievances.

Boyd v. *Adams*, *supra* at 88.

In *Jones* v. *Taber*, 648 F.2d 1201 (9th Cir. 1981) Plaintiff Jones was held in the county jail awaiting sentence. On July 3,

1976 he was taken from his cell and beaten and abused for 3 to 5 hours. He signed a release not to sue in exchange for $500.

The conditions affecting the validity of a release of significant federal rights are eminently a matter of federal law. *Jones* v. *Taber*, 1203, citing *Boyd* v. *Adams*, *supra*.

A release of claims under section 1983 is valid only if it results from a decision that is voluntary, deliberate and informed. *Id.*, citing *Boyd supra* at 87-88, cf. *McCarthy* v. *Cahill*, 249 F. Supp. 194 (D. D.C. 1966).

The burden is always on the party advancing an affirmative defense to establish its validity. *Jones* v. *Taber* at 1203.

Defendant relying on section 1983, releases signed by prisoners, must meet the same standards of validity applicable to maritime releases. *Id.* at 1204.

> Although we do not find cases which analyze the necessary criteria of validity for a section 1983 release, we find adequate and instructive guidance from decisions interpreting maritime releases. "A party who attempts to rely on a maritime release has the burden of proving its validity. *Charpentier* v. *Fluor Ocean Servs., Inc.*, 534 F.2d 71, 72 (5th Cir. 1976). See generally, *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 246-249, 63 S. Ct. 246, 251-52, 87 L. Ed. 239 (1942). Of course, the burden is always on the party advancing an affirmative defense to establish its validity. The special significance of maritime release cases is that a release's validity must be predicated on an unusually strong showing that the nature and extent of the seaman's injuries and the shipowner's potential liability for them was explained clearly to the seaman in circumstances where his signing of the release was quite free and intelligent. In maritime cases, a seaman's release of claims for injuries cannot be relied on by a shipowner otherwise liable for the injury unless the shipowner can affirmatively demonstrate that the claimant understood the nature of whatever statutory and common-law remedies he waived by the release. See, *Charpentier*

v. *Fluor Ocean Servs., Inc.*, 613 F.2d 81, 84 (5th Cir. 1980) (after remand). See also *Strange* v. *Gulf & South American Steamship Co.*, 495 F.2d 1235 (5th Cir. 1974); *Blanco* v. *Moran Shipping Co.*, 483 F.2d 63 (5th Cir. 1973).

In *Bushnell* v. *Rossetti, et al.*, 750 F.2d 298 (4th Cir. 1984) the plaintiff, an attorney claimed and the court stated that,

> . . . for the purposes of reviewing the summary judgment we must assume that the arresting officers subjected him to a variety of tortious conduct including assault, battery, defamation, false imprisonment and conversion of Bushnell's property. On that basis Bushnell brought this federal civil rights action under 42 U.S.C. § 1981, *et seq.*, against the police officers, the Baltimore Police Chief and the Mayor and City Council of Baltimore alleging deprivation of constitutional rights without due process.
>
> In the district court Bushnell conceded he had agreed to dismiss this suit with prejudice in exchange for the November 1982 sentencing consideration, and conceded that the civil defendants had fulfilled their part of the agreement. Bushnell argued however that the entire agreement was void as against public policy and thus should not be enforced by the district court.
>
> Bushnell contends broadly that all agreements releasing civil rights in exchange for criminal sentencing consideration are void as against public policy.

In affirming the summary judgment for the defendants the court stated:

> Here, the record clearly supports the determination that Bushnell's decision to release was voluntary, deliberate, and informed and so entitled to enforcement. Bushnell himself is an attorney and was fully aware of the legal consequences of the release agreement he struck with the defendant's counsel. The agreement was executed only after Bushnell had consulted privately with his own attorney. Bushnell obviously received a considerable benefit from the agreed exchange.

Defendant's counsel had approached Bushnell and his attorney only after Bushnell had been found guilty of disorderly conduct and resisting arrest. The determination of guilt had by then removed the possibility that the charges against Bushnell were fabricated in order to coerce him into releasing his civil claim against the city and its agents.

Plaintiff's assertion that the covenant not to sue is defective because it does not specifically set forth the individual name or names of the various defendants, i.e. selectmen or Chief Barrett is without merit.

The court grants the defendant's motion to dismiss. The court had made its own detailed findings of fact and in accordance with Rule 52 respectfully declines to rule on defendant's requests for findings of fact and rulings of law. *U.S.* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944).

April 29, 1985

s/ MARTIN F. LOUGHLIN

MARTIN F. LOUGHLIN
U.S. District Judge

G. WELLS ANDERSON, ESQ.
CHARLTON J. SWASEY, ESQ.
JAMES S. YAKOVAKIS, ESQ.
DONALD E. GARDNER, ESQ.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 84-279-L

BERNARD E. RUMERY, JR.

v.

TOWN OF NEWTON, ET AL

JUDGMENT

In accordance with the ORDER ON MOTION TO DISMISS/AND OR PETITION FOR DECLARATORY JUDGMENT by the Honorable Martin F. Loughlin, United States District Judge, dated April 29, 1985, judgment is hereby entered.

By the Court,

s/ JAMES R. STARR
Clerk

April 30, 1985

cc: G. WELLS ANDERSON, ESQ.
CHARLTON J. SWASEY, ESQ.
JAMES S. YAKOVAKIS, ESQ.
DONALD E. GARDNER, ESQ.

APPENDIX C

The judgment of the Court of Appeals for the First Circuit sought to be reviewed was entered on December 2, 1985, and is set forth in Appendix A, *supra*. No separate decree or order was entered by the Court of Appeals herein. No rehearing was sought.

APPENDIX D

CONSTITUTIONAL PROVISIONS

First Amendment to the Constitution of the United States:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the Constitution of the United States, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

42 U.S.C. § 1983 (in pertinent part):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

N.H. RSA 641:5 (in pertinent part):

A person is guilty of a class B felony if

> I. believing that an official proceeding. . .or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to. . .
>
> > (b) withhold any testimony, information, document or thing; . . .

N.H. RSA 641:5, I(b).

APPENDIX E

COVENANT NOT TO SUE

Covenant not to sue executed on June 6, 1983 by Bernard Rumery, of 26 Pine Street, in the Town of Danville, County of Rockingham, State of New Hampshire, herein referred to as covenantor, to Mary A. Deary, of 64 Highland Street, Town of Newton, the Police Department of the Town of Newton, and the Town of Newton, all of the County of Rockingham, the State of New Hampshire, herein referred to collectively as covenantee.

In consideration of the cessation and withdrawing of all criminal charges against the covenantor brought as a result of a claim by the first named covenantee, the covenantor does hereby agrees [sic] as follows:

1. *Covenant not to sue.* Covenantor will never institute any action or suit at law or in equity against covenantee, nor institute, prosecute or in any way aid in the institution or prosecution of any claim, demand, action, or cause of action for damages, costs, loss of services, expenses, or compensation for or on account of any damage, loss or injury either to person or property, or both, whether developed or undeveloped, resulting or to result, known or unknown, past, present, or future, arising out of the criminal charges lodged against and subsequent arrest of the covenantor.

2. *Binding effect of covenant.* This covenant shall inure to the benefit of covenantee and their heirs, assigns, successors, and legal representatives. It shall bind covenantor, his heirs, and legal representatives.

3. *Entirety clause.* This instrument reflects the entire covenant between covenantor and covenantee, and no statements, promises, or inducements made by covenantor or any agent of covenantor that are not contained herein shall be valid or binding.

4. *Covenant understood by covenantor.* Covenantor has carefully read the foregoing covenant not to sue and knows the content thereof.

In witness whereof, covenantor has executed this covenant at EXETER, N.H. the day and year first above written.

s/ BERNARD RUMERY
BERNARD RUMERY

State of New Hampshire
Rockingham, ss.

Personally appeared the above-named, Bernard Rumery, and made oath that the foregoing is true to the best of his knowledge and belief.

s/ STEPHEN J.C. WOODS
Justice of the Peace